IN THE COURT OF APPEAL OF BELIZE, A.D. 2009

CRIMINAL APPEAL NO. 13 of 2009

BETWEEN:

YONG SHENG ZHANG **Appellant**

AND

THE QUEEN **Respondent**

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
The Hon. Mr. Justice Barrow	**-**	**Justice of Appeal**

The appellant in person
Mr. Cecil Ramirez for the Crown.

—

3, 19 March and 20 October 2010.

BARROW JA:

[1] On this appeal against sentence only, this Court substituted a sentence of 5 years' imprisonment for the term of 14 years imprisonment that Arana J had imposed following a guilty plea to a charge of manslaughter that had been substituted for the original charge of murder. These are our reasons for decision.

Uncertainty as to the facts

[2] The transcript of the oral submissions of senior counsel who appeared for the appellant in the court below provides for this court the only statement of facts surrounding the offence. There is on record no statement of facts presented to the sentencing court by the prosecution, the accuracy of which the appellant should have been required to accept or dispute and on the basis of which the court should have made its sentencing decision. It is highly unsatisfactory that the court below should have been left to act on no properly established version of events. Equally unsatisfactory is that this court, having been handed a written statement from the appellant giving another version of events that contains allegations capable of raising a plea of self defence, should be unable to simply dismiss this version of events as being contrary to the established facts since there are no established facts.

[3] Because the appellant was represented on the sentencing hearing by able and experienced senior counsel the Court, can feel less disquiet as to whether the appellant's case on sentencing was properly put before the judge but it is unsatisfactory that the Court should be left to resolve an uncertainty in this way because that uncertainty should not have existed. The sentencing judge should not have been left to rely on the version of events contained in the depositions, which we infer might have occurred, since the depositions would have been before the judge. The contents of those depositions should have been reduced into a proper summary and stated as a matter of record to the sentencing court and the appellant should have been required to accept or dispute the accuracy of that statement so that the facts could be established.

[4] Based on what was said by counsel to the court and not challenged or corrected by the prosecution, it appears that on or about 29th March 2008

the appellant, then a forty year old businessman of a Belize City address went to the premises of the deceased, another Chinese businessman. For some time before the appellant had been trying to recover $125,000.00 that the appellant contended the deceased owed him. At the premises of the deceased the appellant pressed the deceased for repayment and "things apparently got out of hand" and the appellant "lost his self control". Counsel related that the appellant instructed him that he had the impression that he was outnumbered by the deceased, the wife of the deceased and about four employees who came to the immediate area where the heated exchange was occurring. It was in those circumstances the appellant reacted by drawing his firearm and shooting the deceased. The appellant told his counsel his intention was merely to wound the deceased in the arm. The deceased was in fact shot in the arm but the bullet exited the arm and penetrated the body of the deceased and the deceased died three or four days later. After the shooting the appellant fled and went directly to the police station and reported he had shot and wounded certain persons.

[5] A number of persons testified to the appellant's good character. He was made out to be hardworking, honest, calm, cool, pleasant and shy. He was said to be a dutiful husband and a loving father of six children. A priest testified that the appellant had accepted God. The appellant was said to be totally remorseful and very sorry for having killed a person who had been his friend and a business associate.

[6] Counsel emphasized to the sentencing court that the appellant surrendered his firearm to the police and cooperated with the police throughout their investigation. Counsel also emphasized that the appellant had pleaded guilty and had not wasted the court's time and also had shown his remorse by accepting responsibility for what he had done with his guilty plea.

Approach to sentencing

[7] After indicating she had given full consideration to the appellant's "excellent character", his remorse and all that had been said on his behalf by his witnesses and counsel in the plea for leniency the judge went on to consider the consequences of the appellant's action of taking the life of another and the impact on the family of the deceased. The judge observed that the crime of manslaughter carried a maximum penalty of life imprisonment and sentenced the appellant to a term of 14 years imprisonment.

[8] In considering the sentence in this case it was helpful to recall the well established principles that should inform a sentencing decision. These were stated by Lawton LJ in **R v Sargeant** 60 Cr. App. R. 74 at 77 as including retribution, deterrence, prevention and rehabilitation. The discussion of these principles by Chief Justice Sir Dennis Byron of the Eastern Caribbean Court of Appeal in St. Vincent Criminal Appeal No. 8 of 2003, **Desmond Baptiste v R** (unreported) which was the lead case in eleven combined appeals, merits reproducing:

> "Retribution
> "Retribution at first glance tends to reflect the Old Testament biblical concept of an eye for an eye, which is no longer tenable in the law[1]. It is rather a reflection of society's intolerance for criminal conduct. Lawton LJ stated at page 77 that:
> "…society through the courts, must show its abhorrence of particular types of crimes, and the only way the courts can show this is by the sentences they pass."
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> "Deterrence
> "Deterrence is general as well as specific in nature. The former is intended to be a restraint against potential criminal activity by others whereas the latter is a restraint against the particular criminal relapsing into recidivist behaviour. Of what value however are sentences that are grounded in deterrence? Specific

[1] R v Sargeant (Supra)

deterrence may be an ineffective tool to combat criminal behaviour that is spontaneous or spawned by circumstances such as addictions or necessity. Drug and alcohol addiction as well as need may trigger high rates of recidivism. Experience shows that general deterrence too is of limited effect. These sentences tend to lose their potency with the passage of time.

"Prevention
"The goal here is to protect society from those who persist in high rates of criminality. For some offenders, the sound of the shutting iron cell door may have a deterrent effect. Some however never learn lessons from their incarcerations and the only way of curbing their criminality is through protracted sentences whose objective is to keep them away from society. Such sentences are more suitable for repeat offenders.

"Rehabilitation
"Here the objective is to engage the prisoner in activities that would assist him with reintegration into society after prison. However the success of this aspect of sentencing is influenced by executive policy. Furthermore, rehabilitation has in the past borne mixed results. Of course sentencing ought not to be influenced by executive policy such as the availability of structured activities to facilitate reform."

[9] A consideration of these principles shows that there is little room for their vindication in the circumstances of this particular case. There is no suggestion the appellant went to the premises of the deceased intending to do violence. The violence arose in the context of a standing commercial dispute between two friends or former friends and business associates when the appellant felt threatened and lost his self control. In that context the sentence called for no element of prevention in the punishment being imposed since prevention is to prevent the particular wrongdoer from persisting in crime. The appellant's crime was far removed from the crimes of the depressing flow of young men who come before the courts and are convicted of the most wanton killings. The appellant's loss of self control in a dispute over $125,000.00 when he felt threatened is not likely to be repeated so there is no need to prevent him from returning to society for fear he may be likely to repeat his criminal conduct.

[10] It was unclear to what extent the aim of deterrence could be served in sentencing the appellant. A spontaneous loss of control in a commercial dispute and resort to gun violence is not typical conduct to be deterred either in the offender or in others. Certainly a sentencing court must heed the words of Shaw LJ in **Bancroft** (1981) 3 Cr. App. R. (S) 119 at 120:

> "Notwithstanding that a man's reason might be unseated on the basis that the reasonable man would have found himself out of control, there is still in every human being a residual capacity for self-control, which the exigencies of the given situation may call for. That must be the justification for passing a sentence of imprisonment, to recognize that there is still left some degree of culpability …"

In the instant case, as the judge noted, the recourse of the appellant for the recovery of the money he believed the deceased owed him was provided by law and the appellant should have availed himself of that recourse instead of taking the law into his own hands. On the other hand, as mentioned, there is no evidence that the appellant went to see the deceased to do more than to repeat his urging that he be paid; there is no evidence that he set out intending to take the law into his own hands. That conduct involves a lesser degree of culpability and the lesser the culpability the lesser should be the sentence. Indeed, on charges for serious crime where exceptionally there is little culpability it is perfectly open to a court to impose a non-custodial sentence. The present appeal was not such an exceptional case but reference is made to such a case to demonstrate that there is no automatic sentence to a lengthy prison term for manslaughter cases: everything depends on the facts of the particular case.

[11] As regards rehabilitation, one did not get any sense that there was need to rehabilitate the appellant; the material placed before the judge indicated that he was a mature, well placed and balanced individual in the society and prison will do nothing positive for him.

[12] Retribution, in the sense of showing society's abhorrence for this killing, seems the only sentencing principle that can truly be served in sentencing the appellant. How much community abhorrence is it reasonable to ascribe to a killing of this type if the community is treated, as it must be treated, as basing its reaction on the facts that were before the court? The community must be given credit for being fair-minded and therefore for appreciating that there are degrees of culpability in criminal wrongs. The community's abhorrence for a killing will necessarily be greater or lesser according to the surrounding circumstances. It is for this reason that there are instances where a non-custodial sentence is handed down for manslaughter: the clear example is manslaughter by negligence, which will generally not attract a sentence of imprisonment. The community's desire for retribution as a reaction to the typical street killing must be distinguished from its reaction in the case of a killing such as this one. On that basis this Court was satisfied it must vindicate the community's abhorrence for this killing by imposing a considered rather than a 'standard' sentence.

Guidelines for sentencing

[13] In the application of these sentencing principles guidelines have been developed that assist a sentencing judge in arriving at a sentence that is deserved, which is to say a sentence that is fair both to the convicted person and to the community, including the family and friends of the victim. A principal guideline is that there must be consistency in sentences. Where the facts of offences are comparable, sentences ought to be comparable, if rationality is to prevail. The objective of consistency has led to the emergence of ranges of sentences. In England, for example, it is established that the range of sentences for manslaughter committed after provocation is between three and seven years

imprisonment; see **Blackstone's Criminal Practice 2005** at B1.31. The particular facts of a case will determine where in the range the sentencing court will come down; thus, an offender who had some time to regain self-control after provocation will attract a heavier sentence than the offender who had no time to regain self-control. An offender who delivers one blow in response will deserve a lesser sentence than one who delivers multiple blows. The weapon used and how likely it was to be lethal may be another factor in determining degrees of culpability and therefore severity of punishment. Similarly, an offender who has a criminal record will not get as much of a reduction from the starting sentence as one who has no criminal record and is widely regarded in his community as a good and caring person. These examples are illustrative and not exhaustive.

[14] The judgment of Sosa JA in Criminal Appeal No. 2 0f 2006 **D.P.P. v Clifford Hyde** at paragraph 12 (unreported; judgment delivered 22 June 2007) establishes that for the standard street fight type of manslaughter case the usual range of sentence is between 15 to 20 years imprisonment. The fact that there is a usual range of sentence underscores the fundamental truth that the starting point in imposing a sentence is not usually the maximum penalty. As a matter of reasoning the maximum penalty must be considered as appropriate only for the worst cases. The features of this case make clear that it does not fall into the category of worst cases. A significant difference exists between this case of unintentional homicide and homicide cases "on the borderline of murder", in which this court has upheld sentences of 25 years imprisonment; see Criminal Appeal No. 10 of 1996 **Enrique Soberanis v The Queen** and other appeals at p. 4 (unreported; judgment delivered February 1997).

[15] The judge, therefore, erred in premising her sentencing exercise on a starting sentence of life imprisonment. The judge, instead, should have started with a sentence of, say, fifteen years' imprisonment and reduced

that figure by as much as one third for the immediate surrender to the police and the guilty plea. Further reductions for the appellant cooperating with the police, for his remorse, for his excellent character and for the absence of any initial homicidal or even violent intent should have been made from the appropriate starting sentence rather than from a starting sentence of life imprisonment.

[16] It was on the basis of this approach that this court arrived at a sentence of 5 years' imprisonment.

MOTTLEY P

CAREY JA

BARROW JA